UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RYAN CALLAHAN, Plaintiff, v. ASHBEL T. WALL, Director of the Adult Correctional Institutions; FRED VOHR, individually and in his official capacity as former medical director; JENNIFER CLARKE, individually and in her official capacity as medical director; and the ADULT CORRECTIONAL INSTITUTIONS, Defendants.	: : : : : : : : : : : : :	C.A. No. 16-160S

REPORT AND RECOMMENDATION

Patricia A. Sullivan, United States Magistrate Judge.

Before the Court for report and recommendation is Plaintiff Ryan Callahan's renewed motion for preliminary injunction and temporary restraining order (ECF No. 78). Plaintiff, who is currently incarcerated at the Rhode Island Adult Correctional Institutions (the "ACI"), has filed a complaint (ECF No. 1) alleging that ACI officials, acting under color of state law, so neglected and mismanaged his health care as to violate the Eighth Amendment's prescription against cruel and unusual punishment, in contravention of 28 U.S.C. § 1983. U.S. Const. amend. VIII. In the present motion, based on what he contends is a medical opinion prescribing surgery, Plaintiff asks the Court to order Defendants, Ashbel T. Wall, II, Dr. Jennifer Clarke, Dr. Frederick Vohr and the Rhode Island Department of Corrections (collectively "RIDOC"), to arrange for him to undergo immediate surgical correction of three hammer toes on his left foot.

I. Background[1]

This motion for a mandatory injunction was heard by the Court on February 17, 2017, together with several other motions.[2] Plaintiff appeared telephonically. It is Plaintiff's second request for injunctive relief; his first (ECF No. 23) sought medical treatment for the same condition. After learning at the first hearing, held on September 13, 2016, that RIDOC had arranged for Plaintiff to receive the precise treatment he was seeking, in that he had appointments to be examined by two independent podiatrists, the Court's report and recommendation recommended that Plaintiff's motion for preliminary injunction be denied. ECF No. 41 ("R & R").

Fortified by the opinion of one of those podiatrists, Dr. Clyde Fish, that "surgery will alleviate the patient's pain" and that "re-surgery . . . may prevent some of the pain," ECF No. 77-33,[3] Plaintiff objected to the R & R, and moved for a rehearing. ECF Nos. 44, 45. On November 22, 2016, Chief Judge William E. Smith ruled on Plaintiff's objection and his renewed motion for preliminary injunction. ECF No. 50. The Court focused on the language of

[1] The detailed history of Plaintiff's struggle with serious foot pain and his resulting trouble with ambulation is set out in the prior report and recommendation (ECF No. 41), supplemented by the memorandum and order (ECF No. 50); it will not be repeated here, except to observe that Plaintiff's serious medical need is not in issue. The Court has consistently accepted that "Plaintiff's distress is palpable through his repeated attempts to seek medical attention for the pain in his foot, and he clearly hopes to receive treatment that will alleviate his pain." ECF No. 50, at 5.

[2] The Court granted second Plaintiff's Motion to Amend/Correct Complaint (ECF No. 77); denied Defendants' Motion to Stay Discovery (ECF No. 74); and denied as moot Defendants' Motion to Dismiss the Complaint (ECF No. 58), Plaintiff's Motion for Relief from Order (ECF No. 67), and Plaintiff's first motion to amend the complaint (ECF No. 69). Additionally, the Court granted in part and denied in part Plaintiff's Motion to serve a second set of interrogatories on Dr. Clarke (ECF No. 60).

[3] The report Dr. Fish prepared following his evaluation of Plaintiff is in the record. ECF No. 77-33. Neither party has presented any report from Dr. Moniz. After reviewing Plaintiff's x-rays, Dr. Fish addressed Plaintiff's complaints about numbness, "varus attitude" or mal-alignment, and pain in his left foot. Id. He had a "long discussion with [Plaintiff] regarding treatment and options," and ultimately concluded that another surgery would not fully correct Plaintiff's left foot. Id. Specifically, Dr. Fish determined "attempted fusions would not correct the varus attitude of [Plaintiff]'s foot nor would it correct the numbness that he is experiencing." Id. With respect to the likelihood that surgery would alleviate pain, Dr. Fish's report is ambiguous, stating somewhat inconsistently in the same paragraph that "surgery will alleviate the patient's pain" and that "re-surgery . . . may prevent some of the pain." ECF No. 77-33.

Dr. Fish's report, which "documents that while surgery may serve to correct the position of Plaintiff's toes and may alleviate his pain, the relevant surgery would neither correct the abnormal positioning of his foot nor the numbness that Plaintiff is experiencing," as well as that "Plaintiff's physical abnormalities and pain are more likely caused by the trauma Plaintiff sustained in 2006 and not by the first corrective surgery." Id. at 5-6. Based on the Fish report, the Court held that Plaintiff had not met his burden of showing likelihood of success on an Eighth Amendment claim based on inadequate medical care, the denial of medical treatment as a punishment, or on reckless decisions about medical treatment sufficient to establish deliberate indifference to Plaintiff's medical issues. Id. In reliance on that holding, the Court adopted the R & R. Id. Further, based on RIDOC's representation that Plaintiff had not yet requested treatment so that it had not yet responded to Dr. Fish's opinion that surgery might alleviate some of Plaintiff's pain, and "[p]resumably Dr. Fish's report has started Plaintiff down the path of receiving treatment and, hopefully, reprieve from his pain," the Court denied Plaintiff's motion for rehearing. Id.

Since that decision issued, RIDOC has procured a second opinion from another podiatrist, Dr. Jordan Dehaven. Dr. Dehaven wrote a detailed report in which he opined that, "[a]t this time no surgical management on the left foot varus is recommended . . . Patient could undergo revision of great toe as well as second and third toe on the left foot however at this time that is not recommended." ECF No. 79-1. Instead of surgery, Dr. Dehaven's opinion recommends the use of orthotics to prevent the "need for further surgical management of the toes." It warns that another surgery would "have considerable risk of recurrence and failure of procedure," as well as that surgical amputation or shortening of the great toe may be needed in the future. Mindful of these risks, it concludes, "I reiterate that at this time surgical management

is not recommended treatment course, custom accommodative orthotic would be most recommended."[4] See generally ECF No. 79-1 at 3-4.

Based on this opinion from a qualified medical professional, RIDOC has now rejected Plaintiff's request for immediate surgery. ECF No. 79 at 4. Plaintiff's second motion for preliminary injunction and temporary restraining order asks the Court to mandate that the surgery must be performed. During the hearing, Plaintiff advised the Court that he expects to be released in May 2017. This increases the urgency of his need for what he argues is medically mandated treatment.

II. Applicable Law and Analysis[5]

Mindful that a preliminary injunction is an extraordinary remedy, Mazurek v. Armstrong, 520 U.S. 968, 972 (1997), which may issue only in instances where a plaintiff has no adequate legal remedy, Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 66 F. Supp. 2d 317, 326 (D.R.I. 1999), I focus on Plaintiff's argument that the Fish opinion demonstrates that he has sustained his burden of showing "[l]ikelihood of success on the merits[, which] is the touchstone of the preliminary injunction inquiry." Philip Morris, Inc., v. Harshbarger, 159 F.3d 670, 673 (1st Cir. 1998). The First Circuit's Eighth Amendment analysis in Kosilek v. Spencer, 774 F.3d 63, 86-89 (1st Cir. 2014) provides the guidance that controls the outcome of this motion.

[4] During the hearing, Plaintiff advised that he had not yet received the orthotic treatment recommended by Dr. Dehaven. Accordingly, the Court directed RIDOC to confirm that Dr. Dehaven's treatment recommendation was being implemented. After some delay, RIDOC advised that the Medical Director had been contacted and that the Plaintiff would be seen for orthotics "the next time the Podiatrist comes to the Department of Corrections;" no date was provided. The Court is troubled that Dr. Dehaven's report was written on January 30, 2017, yet, as of the end of February, it would appear that nothing has been done to implement the treatment that Dr. Dehaven opined would be "helpful for him to ambulate with less pain." ECF No. 79-1 at 3. Whether such a delay is contrary to what Dr. Dehaven recommended is beyond the scope of this report and recommendation, except to note that delay of access to medical care once prescribed can rise to the level of an Eighth Amendment violation. See Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

[5] The applicable standard of review and basic principles of Eighth Amendment jurisprudence are laid out in the R & R and in the Court's memorandum and order. ECF Nos. 41, 50. They will not be repeated here.

In Kosilek, the Massachusetts Department of Corrections had procured differing opinions from qualified medical specialists regarding whether sex reassignment surgery was necessary or appropriate for the plaintiff. 774 F.3d at 69. The issue before the court was whether the failure to provide the surgery could amount to an Eighth Amendment violation in light of one medical opinion that it was necessary to reduce the material risk of suicide or serious self-inflicted harm. Id. Holding that "[t]he law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to 'second guess medical judgments' or to require that the DOC adopt the more compassionate of two adequate options," Kosilek found that the Eighth Amendment is not violated when prison officials chose "one of two alternatives – both of which are reasonably commensurate with the medical standards of prudent professionals, and both of which provide [plaintiff] with a significant measure of relief." 774 F.3d at 90. In such circumstance, proof of a serious medical need does not impose a duty to provide whatever care the prisoner chooses. See Ferranti v. Moran, 618 F.2d 888, 891 (1st Cir. 1980) ("[A]llegations [that] simply reflect a disagreement on the appropriate course of treatment . . . fall[] short of alleging a constitutional violation.").

In this instance, RIDOC has the ambiguous opinion from Dr. Fish, which certainly lends support to the proposition that surgery "will" or "may" alleviate Plaintiff's pain, although it does not recommend surgery, stating instead that surgery "would not correct the varus attitude of [Plaintiff]'s foot nor would it correct the numbness that his [sic] is experiencing." ECF No. 77-33. RIDOC also has the strongly worded opinion from Dr. Dehaven, which not only recommends orthotic treatment in lieu of surgery, but also warns that surgery is likely to fail and carries serious risks for Plaintiff in the future. ECF No. 79-1. If the Court adopts Plaintiff's

interpretation of Dr. Fish's opinion as a recommendation for surgery, Dr. DeHaven's opinion amounts to an alternative treatment approach that is "reasonably commensurate with the medical standards of prudent professionals." Kosilek, 774 F.3d at 90. As the First Circuit teaches in Kosilek, armed with the Dehaven opinion, RIDOC does not violate the Eighth Amendment when it chooses to adopt the non-surgical alternative. Id. Indeed, given the ambiguously tepid tone of the Fish opinion, read in juxtaposition with the clear warning by Dr. Dehaven that surgery could exacerbate Plaintiff's condition, RIDOC's decision to deny surgery seems not just to clear the bar set by the Eighth Amendment, but also to be what is most consistent with the medically appropriate course. Nevertheless, the Court cautions that, having selected the course of treatment recommended by Dr. Dehaven, it must be appropriately (without undue delay)[6] implemented; to ignore such prescribed treatment could give rise to a claim of reckless disregard of a substantial risk of serious harm caused by the delay of treatment. See Coscia v. Town of Pembroke, 659 F.3d 37, 39 (1st Cir. 2011).

Based on the foregoing, I conclude that Plaintiff is unlikely to succeed on the merits of a claim that RIDOC exhibited deliberate indifference to his medical condition by refusing to allow foot surgery. Consequently, I recommend that his renewed motion for injunctive relief be denied.

IV. Conclusion

Based on the foregoing, I recommend that Plaintiff's motion for preliminary injunction and temporary restraining order (ECF No. 78) be DENIED.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting

[6] As stated in note 4 *supra*, the Court expresses no opinion regarding what length of delay in implementing the recommendation for orthotics might be medically appropriate.

party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
February 28, 2017